

May 28, 2013

Elizabeth Timm
Office of Childcare Licensing
1825 Faulkland Road
Wilmington, DE 19805

RE: DFS Proposed Criminal History Record Check Regulation [16 DE Reg. 1152 (May 1, 2013)]

Dear Ms. Timm:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Family Services (DFS) Office of Child Care Licensing (OCCL) proposal to adopt revisions to its standards covering criminal background checks for individuals involved in residential child care. The GACEC would like to share the following observations.

First, in §1.0, Council recommends substituting "Basis" for "Base" in the title.

Second, in §3.0, definition of "Child Care Person", DFS ostensibly forgot to delete some internal notes. The following reference appears twice in the regulation: "(Since definitions are not numbered we would have to use the definition title)".

Third, in §3.0, delete "(see 'Direct Access' below)" and "See definitions 'Foster Parents' and 'Volunteer' below.)".

Fourth, there is an inconsistency between §3.0, definition of "direct access", and §4.1.4.1. The former standard defines "direct access" as excluding contexts in which "another child care person" is present while the latter standard "muddies the waters" by characterizing "direct access" as opportunity for contact outside the "presence of other employees or, adults". The latter reference would include persons who have not undergone the screening for a "child care person". The latter reference would also include contact by "phone" or other media. Council recommends the following amendment to §4.1: "The opportunity to have direct access to ~~or contact with a child without the presence of other employees or adults.~~" The definition of "direct access" renders the "strike-out" language irrelevant.

Fifth, in §3.0, the definition of "direct access" excludes individuals who are proximate to a child if another child care person is present. This should be reconsidered.

A. The statutory definition of "child care personnel" (Title 31 Del.C. §309), which includes a reference to "regular direct access", is not limited to persons who would be "alone" with a child. If DFS defines "direct access" to only cover personnel who would be regularly "alone" with children, employers may justifiably exclude many child care workers from the background check process.

B. There are situations in which perpetrators act as a team to abuse/neglect children. Just because someone is not alone with a child does not mean that the child is not at risk.

Sixth, in §4.1.4, insert "persons" prior to "employed" and merge the text of §4.1.1 into the main section. Consistent with the "Fourth" observation above, this results in the following:

- 4.1.4. persons employed or volunteering at an agency that contracts with the Department who are in a position which involves the opportunity to have direct access to a child.

Seventh, there is some “tension” between applying the background check process only to a “child care person” meeting “direct access” criteria and the categorical mandate in §4.2.1 requiring background checks by position regardless of direct contact. For example, if a groundskeeper, administrative secretary, or administrative bookkeeper is expected to have no “regular direct contact” with children, they would not be a “child care person” subject to a background check. However, §4.2.1 would manifestly require them to submit to a background check. At a minimum, DFS should consider limiting §4.2.1 to persons expected to have “regular direct access” to children.

Eighth, §7.0 is “overbroad”. For example, §7.1.1.1 contemplates consideration of arrest records without conviction. This is inconsistent with recent EEOC guidance. Consistent with the Equal Employment Opportunity Commission (EEOC) Q&A document, Par. 7, the Enforcement Guidance preempts inconsistent state laws and regulations. In the analogous context of adult criminal background checks, the Division of Long Term Care Residents Protection (DLTCRP) recently adopted the following regulatory standard deferring to the EEOC guidance:

8.3. DHSS adopts the guidance from the Equal Opportunity Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 915.002, issued 4/25/2012.

16 DE Admin Code 3105, §8.3.

Ninth, in §10.1.1, insert a comma after the word “employer”.

Tenth, §10.2 would violate the EEOC guidance if “history of prohibited offenses” includes arrests without conviction. The immediately preceding §10.1.2 refers to “arrests” which implies that “offenses” may include arrests.

Eleventh, §10.1.2 includes a plural pronoun (“them”) with a singular antecedent (“employer”). Substitute “the employer” for “them”.

Twelfth, some sections omit punctuation. This should be corrected. See, e.g., §§8.2, 7.1.1, 4.2.1, and 6.1. The latter section has a period after §6.1.10 and no punctuation after §6.1.11.

Thank you for your time and consideration of our comments and recommendations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,

Terri A. Hancharick
Chairperson

TAH:kpc